Petition

81-2003

No. .....

Supreme Court, U.S.
FILED
APR 13 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

[redacted], individually,
GEORGE F. LABASH, as guardian and next friend of Frank T. Labash, and George F. Labash, and MIEKO LABASH, individually,
Petitioners,

VERSUS

THE UNITED STATES DEPARTMENT OF THE ARMY, THE UNITED STATES DEPARTMENT OF DEFENSE, and THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1982

QUESTIONS FOR REVIEW

1. Do the petitioners have a viable cause of action, cognizable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680?

2. Do the petitioners have a viable cause of action cognizable under the Military Claims Act, 10 U.S.C. §§ 2731-2737?

3. Does the denial of subject matter jurisdiction under the Federal Tort Claims Act and Military Claims Act effectively deny petitioner's Equal Protection and Due Process under the Law?

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANK T. LABASH, individually,
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of Frank T. Labash, and George F. Labash,
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VERSUS

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The United States District Court for the Western District of Oklahoma entered its order (Appendix A), in Case Number CIV-80-139, on July 8, 1980, sustaining defendants' (respondents herein) Motion to Dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, for lack of subject matter jurisdiction. The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix B) was thereafter entered January 13, 1982.

JURISDICTION

Jurisdiction is conferred on this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 13th day of January, 1982, by Writ of Certiorari pursuant to Title 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

While serving in the United States Army, Frank T. Labash was admitted to the United States Army Hospital, Landstuhl, Germany, for diagnostic evaluation. While a patient, Frank T. Labash was administered anesthestizing medication, Innovar-VET, a medication intended for veterinary use and not for human consumption. Shortly thereafter, Frank T. Labash lapsed into a coma from which he never emerged. He died at the Veterans Hospital in Oklahoma City, Oklahoma, after being discharged from the military service and after petitioners filed their original complaint in the United States District Court for the Western District of Oklahoma. It is undisputed that the death of Frank T. Labash was a direct result of medical malpractice by military medical personnel at the United States Army Hospital, Landstuhl, Germany.

The only relief received by petitioners was in the form of free medical care and limited compensation under the Veterans Benefit Act of Title 38 of the United States Code. The administrative claims under Title 10 U.S.C. §§ 2731-2737, was denied, without judicial review, by the Secretary of the Army.

Petitioners initiated this action seeking to recover damages for the respondents' negligence in providing medical

treatment for Frank T. Labash. The Complaint was dismissed in the courts below for want of subject matter jurisdiction. The proceedings in the lower courts were without oral testimony or argument. All matters presented were by written evidence and briefs submitted.

STATUTORY REFERENCES

Title 28, United States Code, §1346, provides in pertinent part:

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28, United States Code, §2671, provides as follows:

> "As used in this chapter and section 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> " 'Employee of the government' includes officers or employees of any federal agency, members of the mili-

tary or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"'Acting within the scope of his office or employment' in the case of a member of the military or naval forces in the United States, means acting in line of duty."

Title 28, United States Code, §2674, provides as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Title 10, United States Code, §2733, provides in pertinent part as follows:

"(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the chief legal officer of the Coast Guard, as appropriate, if designated by him, may settle and pay in an amount not more than $25,000, a claim against the United States for — . . .

* * *

(3) personal injury or death; either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment or otherwise incident to noncombat activities of that department or the Coast Guard.

"(b) A claim may be allowed under subsection (a) only if (1) It is presented in writing within two years after it accrues.

* * *

(3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service; . . .

* * *

"(d) If the Secretary concerned considers that a claim in excess of $25,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $25,000 and report the excess to Congress for its consideration."

ARGUMENT FOR GRANTING CERTIORARI

The United States Court of Appeals for the Tenth Circuit very aptly points out in its decision that the United States may not be sued without its consent. *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and the Federal Tort Claims Act waives the sovereign immunity of the United States in certain actions arising out of tortious conduct by government employees. The lower court then relied on the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), to conclude that the petitioners' claim was barred because his injury was incurred "incident to service." The court reached this conclusion by reasoning that the petitioner,

Frank T. Labash, was on active duty at the time he was hospitalized and the negligent medical treatment was administered which ultimately led to the untimely death of said petitioner.

In discussing the Federal Tort Claims Act, this Court stated in *Feres* v. *United States,* supra, as follows:

> "The Tort Claims Act was not an isolated and spontaneous flash of Congressional generosity. It marks the accumulation of a long effort to mitigate unjust consequences of sovereign immunity from suit. . . . The primary purpose of the Act was to extend a remedy to those who had been without."

Apparently, the lower court has concluded that the medical care and limited compensation provided to the petitioners by the Veterans Benefit Act under Title 38 of the United States Code has sufficiently provided a remedy for the tortious conduct of the respondents. Petitioners submit, however, that the primary purpose of the Tort Claims Act has not been met in the instant action in that there has been no resolution of the unjust consequences of sovereign immunity. To say that the benefits of the Veterans Benefits Act have adequately compensated, is to completely ignore the damage inflicted upon the petitioners. An inadequate remedy is no remedy.

In structuring the "incident to service" limitation upon the application of the Federal Tort Claims Act, this Court has previously reasoned that the special relationship between a serviceman and his superiors mandates the exclusion of lawsuits under the Tort Claims Act. The Court in *Callaway* v. *Garber,* 289 F.2d 171 (1961), stated:

> "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that act as excluding claims of that character."

This language has been repeated in a number of decisions to justify the exclusion of claims by service personnel.

The Circuit Courts have, on various occasions, recognized the faulty reasoning of the "incident to service" exception in situations involving military personnel who receievd injuries, not in the line of active duty, but because of the fact that they happened to be clothed in a military uniform. The United States Court of Appeals for the Third Circuit stated in *Bailey* v. *Dequevedo*, 375 F.2d 72 (1967):

> "Although *Feres* v. *United States*, supra, involved the construction of the Tort Claims Act, the Court's decision did not turn on the language of the Act itself but on the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under Tort Claims Act were allowed for negligent Orders given for neglient acts committed in the course of military duty. . . . *United States* v. *Brown*, 348 U.S. 110, 112, 75 Sup. Ct. 141, 143, 99 Lawyers Edition 139 (1954). Thus in *Brown*, it was held that a discharged veteran could maintain an action against the United States under the Tort Claims Act for injuries suffered, after his discharge, in a Veterans Administration Hospital as a result of a negligent treatment of a service con-

> nected disability. The Court distinguished *Feres* by stating that in the case before it, 'the injury for which suit was brought was not incurred while plaintiff was on active duty or subject to military discipline.' 348 U.S. 112, 75 Sup. Ct. 143. The Court also stated that it adhered 'to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty.' 348 U.S. 113, 75 Sup. Ct. 144."

The only difference between the cases of *United States* v. *Brown*, supra, and the case at bar, is that the *Brown* decision involved a veteran, one who was injured while on active duty and discharged from active service and while in Veterans Administration Hospital was the victim of medical malpractice. *Brown* was allowed to maintain his cause of action under the Federal Tort Claims Act. In the case at bar, Labash was the victim of medical malpractice in a military hospital and was discharged from active service and later died in a Veterans Administration Hospital. However, the medical malpractice was inflicted upon the petitioner while he was technically in active service. Again, the issue does not turn on the language of the act itself, but on the effect of the maintenance of the petitioners' lawsuit on military discipline. Labash was not injured due to any negligent orders given but was injured after he was routinely admitted to a military hospital to undergo tests. The maintenance of the Labash claim in a Court of Law would have absolutely no effect on the military discipline. Surely, the interests of the individual in the case at bar greatly outweigh the governmental interest in denying the petitioners an adequate remedy.

The case of *Jackson* v. *Kelly*, 557 F.2d 735 (1977), involved a medical malpractice suit against an Air Force physician who had treated the plaintiff, a dependent spouse of an Air Force Captain, for conditions relating to pregnancy. The District Court dismissed the plaintiff's case, and on appeal the Court of Appeals for the Tenth Circuit determined that the treatment by the physician did not involve governmental discretion and therefore the physician was not entitled to assert the doctrine of official immunity. The petitioners in the case at bar are mindful to the fact that the plaintiff in the *Jackson* case was not in active government service, but the same theory for permitting the plaintiff's claim in the *Jackson* case also applied to the case at bar. Therein, the Court stated:

> ". . . the threat of liability for negligence would not deter the fearless exercise of medical discretion within government service any more than the same threat deters the exercise of medical discretion outside of government. Holding government medical personnel to the same standards of care which they would face outside the government service in no way burdens their public responsibility or deters entry into government service for the vigorous exercise of public responsibility once having entered that service. . . . The controvening consideration is whether immunity would contribute to effective government. . . . In this case, however, the burden to effective government does not outweigh the dangers to individual citizens of being severely or permanently injured or maimed by negligent military physicians. Effective government would not suffer excessively if monetary compensation were permitted because the alleged wrongful conduct does not involve politically sensitive judgments or discretionary governmental acts."

It is rather incongruous that the Federal Tort Claims Act would provide a remedy for medical malpractice to military dependents, but under the same set of circumstances, not military personnel categorized as being on active duty. Any differentiation in the two sets of circumstances is purely artificial and quite simply denies the petitioners in the case at bar "equal protection" under the laws.

The Secretary of the Army denied the petitioners' claim for relief under the Military Claims Act and the lower courts have concluded that there is no judicial review of the Secretary of the Army decision. However, it is the petitioners' position that Frank T. Labash was not technically involved in activities "incident to service" at the time the tortious conduct was committed on his person. With this position in mind, petitioner directs this Court to the case of *Welch* v. *United States*, 446 F.Supp. 75 (1978), where that Court aptly pointed out in its syllabus as follows:

> "Despite provision in the Military Claims Act that settlement of a claim thereunder is final and conclusive, judicial review was not precluded with respect to question of law, as to whether claimant's decedent was killed incident to service within exclusionary provision of the act."

The petitioners in the case at bar contend that they are entitled to have a judicial determination as to the issue of whether their case falls within the "incident to service" exclusion and whether such a determination was even made by the Secretary of the Army in denying the petitioners' claim. Each case must be determined on a case by case basis and in accordance with the unique facts of each situation. There are no statutory guidelines promulgated by

Congress to determine whether an injury is incurred "incident to service" or whether such injury was incurred outside the scope of such service. Such decisions are purely a matter of judicial determination. Such determination must be made based upon the factors involving military discipline discussed previously. A refusal of the lower court's exercise of jurisdiction to determine such an issue is an absolute denial of due process under the law and repels the petitioners to the inadequate nominal remedies under the Veterans Benefits Act which have previously been referred to.

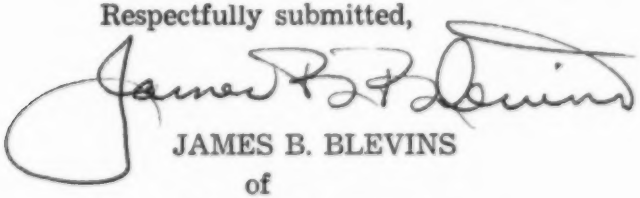
The petitioners' claim is meritorious as evidenced by the respondents' admissions that the act of tortious medical malpractice occurred just as was originally alleged in petitioners' complaint filed in the District Court for the Western District of Oklahoma. The Secretary of the Army denied the petitioners relief requested under the Military Claims Act because the injuries to the petitioner Labash occurred as an incident to military service. Such an issue is reviewable as was pointed out in the case of *Welch* v. *United States,* supra.

In its opinion, the United States Court of Appeals for the Tenth Circuit pointed out that courts have consistently upheld the *Feres* doctrine even though theoretical basis for the *Feres* decision is subject to serious doubts. The lower court has recognized that other Circuit Courts have reluctantly affirmed dismissals of claims based on the *Feres* doctrine. Such courts recognize that application of the *Feres* doctrine results in unjust administration of remedies which prove to be wholly inadequate.

CONCLUSION

Current changes in our society and the posture of the United States as a military power, one consisting of voluntary service personnel, established that there must be a reassessment of the application of the *Feres* doctrine and its effect on military discipline. Petitioners urge this Court to recognize that there is no compelling impact on military discipline by allowing claims such as one urged by the petitioners in the case at bar. We must carefully weigh the interests of the individual against the interests of government and the military and recognize that during a time of peace and volunteer armed service, the *Feres* doctrine has no application and a denial of remedy under the Federal Tort Claims Act and a denial of review of the Secretary of the Army's decision, effectively acts to curtail this petitioners' equal protection and due process under the law.

Respectfully submitted,



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Attorney of Record for Petitioners

April, 1982

CERTIFICATE OF SERVICE

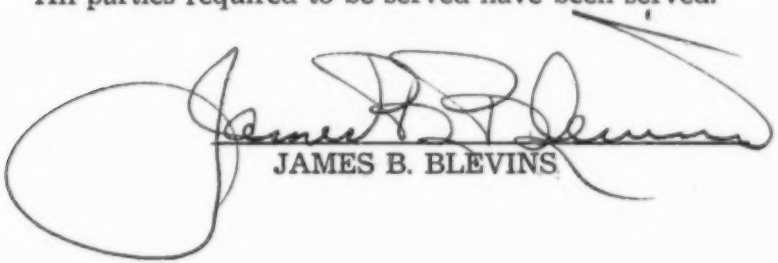
This is to certify that three (3) true and correct copies of the above and foregoing *Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit* were mailed this 27th day of April, 1982, to each of the following listed below:

Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

John E. Green
Assistant U. S. Attorney for the
Western District of Oklahoma
4434 U. S. Courthouse
Oklahoma City, Oklahoma 73102

Major J. Thomas Halloman
Office of the Judge Advocate General
Department of the Army
Washington, D.C. 20310

All parties required to be served have been served.



JAMES B. BLEVINS

Appendix

APPENDIX A

[Order of the United States District Court for the Western District of Oklahoma, Case No. CIV-80-139-T, filed July 8th, 1980.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed July 8, 1980]

FRANK T. LABASH, individually, GEORGE F. LABASH, as guardian and next friend of FRANK T. LABASH, and GEORGE F. LABASH and MIEKO LABASH, individually,	)	
Plaintiffs	)	No.
vs.	)	CIV-80-139-T
THE UNITED STATES DEPARTMENT OF THE ARMY, THE UNITED STATES DEPARTMENT OF DEFENSE and the UNITED STATES OF AMERICA,	)	
Defendants	)	

ORDER

This action is before the Court on defendants' Motion to Dismiss or in the Alternative for Summary Judgment. Plaintiffs have responded in opposition to the motion and the parties have submitted briefs in support of their respective positions.

While serving in the United States Army and stationed in Germany, Frank T. Labash was admitted to the United States Army Hospital, Landstuhl, Germany, for diagnostic evaluation of seizures which could not be controlled with medication. One particular diagnostic test, a pneumoencephalogram, was to be performed and in anticipation thereof it was determined that Frank T. Labash be given an anesthetizing medication intended to produce a drowsy patient with a reduced perception to discomfort. It was thought that the medication prescribed for this purpose, called Innovar, had been administered, when in fact, the medication actually administered was Innovar VET. Innovar VET is not intended for human use but is instead a much stronger concentration of the same ingredients as are used in Innovar and is used only for the purpose of anesthetizing animals. The result was that Frank Labash

lapsed into a deep coma followed a cessation of breathing and heartbeat. Hospital personnel managed to restore his heartbeat and breathing, but Frank T. Labash did not revive from his coma. The record before the Court is not clear, but it appears to indicate that Frank T. Labash has died since the filing of this action.

Plaintiffs initiated this action seeking to recover under the Military Claims Act, 10 U.S.C. §2733 and under the Federal Tort Claims Act, 28 U.S.C. §§2671, et seq. The defendants have moved to dismiss on the grounds that this Court lacks jurisdiction over the subject matter of this action. In support of their claim, the defendants contend that 28 U.S.C. §2680(k) operates to deny this Court of subject matter jurisdiction under the Federal Tort Claims Act. In this regard, §2680(k) states:

> "The provisions of this chapter and §1346(b) of this title shall not apply to . . . (k) any claim arising in a foreign country."

It is clear that plaintiffs' claim in this action arose in Landstuhl, Germany. Accordingly, the Court must conclude that it has no jurisdiction over this action on the basis of the Federal Tort Claims Act.

The defendants further contend that plaintiff's claim is barred under the Military Claims Act by 10 U.S.C. §2733 (b)(3). In this regard, §2733(b)(3) provides:

> "(b) A claim may be allowed under subsection (a) only if . . . (3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service."

The defendants contend that Frank T. Labash's death was incident to his service as a member of the United States Army serving in Germany. In opposition to the defendants' claim, plaintiffs assert that mere membership in the Armed Services does not preclude recovery and does not establish that the claim arises "incident to service". The parties

have cited numerous cases, decided under the Federal Tort Claims Act, tending to show what does and does not constitute an injury which is received "incident to service."

This Court is aware that the Federal Tort Claims Act exception, in regard to injuries received by military personnel incident to their service, is an exception which the Supreme Court derived from the Military Claims Act in *Feres* v. *United States,* 340 U.S. 135 (1950). However, the parties have only cited one case where a court interpreted the phrase "incident to his service" in the context of the Military Claims Act. See *Welsh* v. *United States,* 446 F. Supp. 75 (D. Conn. 1978). While the cases cited by the parties seem to indicate that the question of whether the tort in question arose "incident to service" must be determined on a case by case basis under the Federal Tort Claims Act, the same kind of determination is not necessary under the Military Claims Act. Senate Report No. 2216, 85th Cong., 2nd Sess., *reprinted in* [1958] U.S. Code Cong. Admin. News 3784, indicates that the congressional intent of the Military Claims Act as amended is not to cover the type of claim prosecuted here. Senate Report No. 2216 states, in part, as follows:

> "The claims which are cognizable under this section include those arising incident to maneuvers, special field exercises, use of weapons, practice bombings, the operation of aircraft and missiles, and the use of ballons, animals equipment, or devices having latent mechanical defects. It also includes claims arising from use of moving combat and other vehicles designed especially for military use, and the use and occupation of real estate. Ordinary traffic accident and other tort type claims are excluded by the partial repeal of the original statute upon which §2733 is based by §424(e) of the Act of August 2, 1946 (60 Stat. 846), the Federal Tort Claims Act."

It is thus apparent that even if plaintiffs' claim is not "incident to his service", it is still not the kind of claim cogniz-

able under the Military Claims Act. Accordingly, this Court must conclude that it does not have jurisdiction over plaintiffs' claim on the basis of the Military Claims Act.

This is not to say, however, that plaintiffs have no recourse for the obvious wrong committed against them. The fact that plaintiffs have no recourse to the courts or executive agencies does not foreclose plaintiffs from the possibility of seeking recourse from Congress itself. As the Supreme Court indicated in *Feres*, one of the primary intentions of the Congress in passing the Federal Tort Claims Act was the volume of private bills presented to Congress seeking redress of claimed governmental wrongs. Moreover, that Congress intends to monitor serious wrongs committed by members of the military is clearly indicated in the Military Claims Act itself. 10 U.S.C. §2733(d) states as follows:

> "If the Secretary concerned considers that a claim in excess of $25,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $25,000 and report the excess to Congress for its consideration."

Thus, it must be concluded that Congress intended to reserve unto itself the review of those claims for which it has provided neither Judicial nor Executive review.

In summary, it is the conclusion of this Court that it is without jurisdiction to decide the claims presented by the plaintiffs. Accordingly, the defendants' motion to dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, for lack of subject matter jurisdiction must be, and hereby is, granted.

It is so ordered this *8th* day of July, 1980.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

Entered in judgment docket July 8, 1980

APPENDIX B

[Order of the United States Court of Appeals (10th Cir.), Case No. 80-1799, filed January 13th, 1982, affirming the Order of the United States District Court for the Western District of Oklahoma.]

PUBLISH

[Filed Jan. 13, 1982]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FRANK T. LABASH, individually, GEORGE F. LABASH, as guardian and next friend of FRANK T. LABASH, and GEORGE F. LABASH and MIEKO LABASH, individually, Plaintiffs-Appellants,	)	No. 80-1799
v.	)	
THE UNITED STATES DEPARTMENT OF THE ARMY, THE UNITED STATES DEPARTMENT OF DEFENSE and the UNITED STATES OF AMERICA, Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-80-139-T)

Submitted on the briefs:

James B. Blevins, Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

Larry D. Patton, United States Attorney for the Western District of Oklahoma; John E. Green, First Assistant U. S. Attorney; Major J. Thomas Holloman, JAGC, Department of the Army, Washington, D.C., of counsel, for Defendants-Appellees.

Before DOYLE, BREITENSTEIN and McKAY, Circuit Judges.

[APPENDIX]

McKAY, Circuit Judge.

While serving in the United States Army, Frank LaBash was admitted to the United States Army Hospital, Landstuhl, Germany, for diagnosis of a medical problem. In the course of treatment, hospital employees administered to him a medication not intended for human use. Shortly thereafter Mr. LaBash lapsed into a coma from which he never emerged; he died some months later at a stateside Veterans' Hospital. It is clear from a review of the record that Mr. LaBash's injury and subsequent death resulted from medical malpractice by military medical personnel. The only relief he received for his injuries was in the form of free medical care and limited compensation, as provided by the Veterans' Benefits Act, under Title 38 of the United States Code. His claim pursuant to the Military Claims Act, 10 U.S.C. §§ 2731-2737, was denied by the Secretary of the Army.

Mr. LaBash and his parents initiated this action seeking to recover damages, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and the Military Claims Act, 10 U.S.C. §§ 2731-2737, for the government's negligence in treating Mr. LaBash.[1] On the government's motion, the trial court dismissed the entire action for want of subject matter jurisdiction. We now are asked to review the propriety of that dismissal.

It is well settled that the United States may not be sued without its consent. *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Federal Tort Claims Act waives United States' sovereign immunity in actions arising out

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[1] Frank Labash, twenty years old and an only child, died during the pendency of this suit. His father, George LaBash, is serving as guardian and next friend for his son. In addition, Mr. LaBash's parents are seeking damages on their own behalf.

of tortious conduct by governmental employees. However, the scope of the government's waiver is limited by exceptions contained in the Act itself and by judicial interpretation and application of the Act.

Prior decisions of this court and of the United States Supreme Court clearly establish that the Federal Tort Claims Act does not provide a basis for jurisdiction over the instant action. The doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), holds that a serviceman injured as a result of activity incident to his service may not sue the United States for compensation under the Federal Tort Claims Act. The *Feres* doctrine is based in part on the perceived deleterious effects of service-related suits on military discipline and the express provision by Congress of another remedy through the Veterans' Benefits Act, which provides compensation for medical care and a limited income allowance to those injured while in the military, regardless of whether the government is at fault. This court consistently has followed the *Feres* doctrine. *See, e.g., Carter* v. *City of Cheyenne*, 649 F.2d 827 (10th Cir. 1981); *Harten* v. *Coons*, 502 F.2d 1363 (10th Cir. 1974), *cert. denied*, 420 U.S. 963 (1976); *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972).[2] There is no question that Mr. LaBash's injury occurred incident to his military service and, accordingly, that his claim against the United States based on negligence is governed by the *Feres* doctrine. The holding of this court in *Harten* v. *Coons*, 502 F.2d 1363 (10th Cir. 1974), which involved a claim of medical malpractice by military medical personnel on facts identical in all pertinent respects to those of the instant

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[2] One of the cases comprising the *Feres* trilogy arose in this circuit and involved medical malpractice by military medical personnel. Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

case, is dispositive of any claim to the contrary.[3] In *Harten* the court stated that

> [w]hether a serviceman's injury arises out of activity 'incident to service' depends on whether it stems from an official military relationship between the negligent person and the serviceman. In other words, it depends on the claimant's 'status' at the time of the injury. [citation omitted]
>
> Thus, if a claimant is on leave, or on inactive status at the time of the injury, or if the injury is not the product of a military relationship, suit under the Act may be allowed.
>
> On the other hand, when a serviceman on active duty sustains an injury stemming from the military relationship, courts consistently have denied recovery under the Act. [notes omitted]

502 F.2d at 1365. At the time of injury, Mr. LaBash was on active duty and a military relationship existed between him and the military medical personnel responsible for his injury. Accordingly, the injury was suffered in activity "incident to his service," and his claim under the Federal Tort Claims Act is barred by the *Feres* doctrine.[4]

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[3] Moreover, two of the cases comprising the *Feres* trilogy involved medical malpractice by military medical personnel: Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), and Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).

[4] *See* Brooks v. United States, 337 U.S. 49 (1949), and United States v. Brown, 348 U.S. 110 (1954), in which the Court found that an injury did not occur incident to service. In *Brooks*, two servicemen were on leave when struck by an Army truck on a public highway. In *Brown*, a discharged veteran received negligent treatment after his discharge for an injury received while on active duty.

In the instant case, the trial court relied chiefly on 28 U.S.C. § 2680 (k) in holding that there was no jurisdiction under the Federal Tort

The Secretary of the Army denied Mr. LaBash's claim for relief under the Military Claims Act, 10 U.S.C. §§ 2731-2737. The trial court concluded that the Military Claims Act affords no relief for a claim of this kind. Although we agree with the trial court's conclusion, we have determined that 10 U.S.C. § 2735, in the absence of a cognizable constitutional claim, expressly precludes review of the Secretary's decision to deny the claim by the district or appellate court. As pertinent here, § 2735 provides that "[n]otwithstanding any other provision of law, the settlement of a claim under [the Military Claims Act] is final and conclusive." Section 2731 defines "settle" to mean "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance." It is clear then that the Secretary's denial of this claim was a "settlement," as defined by the statute, and that the statute contemplates no further review of the Secretary's decision.

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59, 701-06, does not provide a basis for reviewing the Secretary's decision. The Supreme Court in *Califano* v. *Sanders*, 430 U.S. 99, 107 (1977), held that § 702, which states that a person wronged by agency action is entitled to judicial review, does not afford an implied grant of subject matter jurisdiction permitting federal judicial review of agency action. Moreover, § 701(a)(1) expressly provides that the right of judicial review set forth in § 702 is not applicable to the extent that another statute precludes judicial review. Section 2735 precludes judicial review of claims denied under the Military Claims Act, and there-

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[4] (Continued)

Claims Act (FTCA). This subsection excludes FTCA recovery for "any claim arising in a foreign country." Plaintiffs dispute the trial court's finding that the claim arose in a foreign country. Since we find a clear absence of jurisdiction under the FTCA, in accordance with the *Feres* doctrine, resolution of this dispute is not material to disposition of the claim.

fore, notwithstanding its review provisons, the APA does not provide a basis for federal court jurisdiction to review the Secretary of the Army's final denial of Mr. LaBash's claim.[5]

There also is no basis for federal question subject matter jurisdiction under 28 U.S.C. § 1331. The Court in *Califano* v. *Sanders*, noted that jurisdiction conferred on federal courts to review agency action by § 1331 is subject to any "preclusion of review statutes created or retained by Congress." 430 U.S. at 105. As we have noted, § 2735 is just such a statute.

Finally, we find no merit in plaintiffs' contention that the Due Process Clause of the Fifth Amendment to the United States Constitution requires review of the Secretary's decision to deny Mr. LaBash's claim. Plaintiffs do not specify in what way Mr. LaBash's constitutional rights have been violated, but rather suggest that lack of access to federal district court for review of the Secretary's decision is per se a violation of due process. We do not agree. Congress has chosen to limit the extent of the United States' waiver of sovereign immunity by restricting a serviceman to the specific remedies specified in the Veterans' Benefit Act. *See Henninger* v. *United States*, 473 F.2d 814 (9th

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[5] We are aware that at least one court has held that § 2735 does not preclude judicial review of agency construction and application of law, but only makes the Secretary's settlement of a Military Claims Act claim final with respect to administrative review. Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978). The United States Supreme Court, in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), indicated that, while there is a presumption that final agency action is subject to judicial review, courts should restrict access to judicial review as intended by Congress, when this legislative intent is shown by "clear and convincing evidence." 387 U.S. at 140-41. In our view, § 2735 provides "clear and convincing evidence" of Congress' intent. *Accord*, Towry v. United States, 459 F. Supp. 101 (E.D. La. 1978), *aff'd*, 620 F.2d 568 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

Cir.), *cert. denied*, 414 U.S. 819 (1973); *Thomason* v. *Sanchez*, 398 F. Supp. 500 (D.N.J. 1975), *aff'd*, 539 F.2d 955 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); *Towry* v. *United States*, 459 F. Supp. 101 (E.D. La. 1978), *aff'd*, 620 F.2d 568 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). Inasmuch as the Secretary followed the prescribed statutory procedure, plaintiffs' constitutional claim must fail. Plaintiffs have not complained that the Secretary failed to comply with statutory process, and indeed, his compliance is clear from the record.

In conclusion, we hold that the United States has not waived its sovereign immunity to suit on plaintiffs' claim under the Federal Tort Claims Act. Although many courts have expressed reservations about the continuing validity of the broad *Feres* doctrine, only the United States Supreme Court can overrule or modify *Feres*. *See, e.g., Hunt* v. *United States*, 636 F.2d 580, 589 (D.C. Cir. 1980) ("[T]he *Feres* doctrine clearly lives, although its theoretical bases remain subject to serious doubt."); *Thomason* v. *Sanchez*, 539 F.2d 955, 960 (3rd Cir. 1976); *Veillette* v. *United States*, 615 F.2d 505, 506 (9th Cir. 1980) ("reluctantly" affirming dismissal under the *Feres* doctrine). Therefore, once again we are constrained to follow the *Feres* doctrine, notwithstanding its harsh result.[6]

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[6] In recent cases, the Third Circuit, en banc, in an action involving injury to a serviceman incident to his service, rejected a constitutional intentional tort cause of action, based on the policy concerns underlying the *Feres* doctrine, *viz*, the effect of such suits on military discipline and Congress' express provision of another remedy. Jaffee v. United States, No. 79-1543 (3d Cir. Nov. 2, 1981); the Ninth Circuit in Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), held that the *Feres* doctrine precluded a claim based on post-service occurrence of an injury (cancer) caused by an in-service act (exposure to radiation), but, in Broudy v. United States, 661 F.2d 125 (9th Cir. 1981), held that a claim that the government, in an independent, post-service, negligent act, failed to warn the serviceman of possible injury (cancer) or to monitor for possible injury arising from an in-service act (exposure to radiation), was not pre-

We also hold that neither the trial court nor this court has jurisdiction to review the Secretary's settlement of a claim under the Military Claims Act, absent a sufficiently pleaded allegation that a cognizable constitutional right has been violated.[7]

Accordingly, plaintiffs are confined to the remedy provided by Congress in the Veterans' Benefits Act.

AFFIRMED.

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[6] (Continued)
cluded by the *Feres* doctrine. The court based its holding on the United States Supreme Court's 1954 decision in United States v. Brown, 348 U.S. 110 (1954), that a claim arising from a post-service act of negligence was not barred under *Feres*.

[7] Even were we to find jurisdiction to review plaintiffs' claim based on the Military Claims Act, we would hold it not cognizable under the express provisions of the Act. Section 2733(b)(3) of the Military Claims Act provides:

> (b) a claim may be allowed under subsection (a) only if—
>
> * * *
>
> (3) it is not for personal injury or death of such a member [of the Army, Navy, Air Force, Marine Corps or Coast Guard] or civilian officer or employee whose injury or death is *incident to his service*. [Emphasis added].

Although there is little case law construing the incident to service exclusion of the MCA, the Supreme Court in *Feres* discussed the Military Claims Act, in dictum, and implied that the standard for determining what constituted activity incident to service was the same under the Military Claims Act as under the Federal Tort Claims Act. 340 U.S. at 144. (The "incident to service" exclusion in the current MCA is the same as that in the then-extant Military Personnel Claims Act, 33 U.S.C. § 223b.) On the strength of the *Feres* dictum, at least one federal court has expressly so held, Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978), and we would agree.